MOTION FILED
AUG 26 2004

(2)

04-124

In The
Supreme Court of the United States

CHANDER KANT and ASHIMA KANT, Petitioners,

v.

BREGMAN, BERBERT, SCHWARTZ & GILDAY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Brian P. Murphy
Griffin, Farmer & Murphy
1912 Sunderland Place, N.W.
Washington, D.C. 20036
(202) 429-9000

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF *AMICUS CURIAE* 1

STATEMENT AND QUESTION PRESENTED 1

ARGUMENT

This country either has a system of general notice pleading or it does not. 1

Policy 2

Division in the Circuits 3

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Dickson, et al v. Microsoft Corporation, et al., 309 F. 3d 193 (4 Cir., 2002) 3

Spanish Broadcasting System of Florida v. Clear Channel Communications, Inc., et al., _____F. 3d _____ (11 Cir., June 30, 2004) 3

Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 2,4

Tahfs v. Proctor, et al.,316 F. 3d 584 (6 Cir., 2003) 3

Rules

F.R.C.P. Rule 8(a)(2) 1,2

Miscellaneous

FRANK, JEROME, COURTS ON TRIAL (Princeton, NJ, Princeton University Press, 1949) 3

MOTION TO FILE BRIEF AS AMICUS CURIAE

Under Rule 37.2 of the Rules of this Court, Property Rights Foundation of America, Inc. ("PRF") moves for leave to file the accompanying brief in support of the petition for certiorari. Counsel for the Petitioner has consented to the filing of this brief, but counsel for the respondent has been asked and has not consented.

Property Rights Foundation of America, Inc. ("PRF") is a national, grassroots, New York-based not-profit organization dedicated to the right to own and use private property in all its fullness as guaranteed in the United States Constitution. PRF has been before courts, including this Court, as an *amicus curiae* or as "of counsel" representing the interests of property owners in a number of cases.

Amicus has a strong in interest in this Court's granting *certiorari* because the position of the Fourth Circuit Court of Appeals and other courts in certain cases requiring heightened pleading requirements adversely affects property owners whose rights often depend on open access to the United States legal system and whose causes of action are frequently unpopular.

WHEREFORE, the Motion for Leave to File the accompanying Brief of Property Rights Foundation of America, Inc. as *amicus curiae* should be granted.

Respectfully submitted,

BRIAN P. MURPHY

Griffin Farmer & Murphy
1912 Sunderland Place NW
Washington, DC 20036
(202) 429-9000

Counsel for Property Rights Foundation of America, Inc.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS*

The interest of the *amicus curiae* is stated in the accompanying motion for leave to file this brief.[1]

STATEMENT AND QUESTION PRESENTED

For sake of brevity, Amicus adopts the statement of the case, question presented and factual statements made in the Petition for Writ of Certiorari. Amicus would add, however, that the impatience of the Maryland legal community with the Petitioners comes through loud and clear. It is plain that a jurist may *want* to throw out a case with such confrontational accusations but that is why there is a rule of law and a system of review through the writ of *certiorari*.

ARGUMENT

1

Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

This country either has a system of general notice pleading or it does not. In the Federal court system, the decision was made in the affirmative in 1938 with the adoption of the Federal Rules of Civil Procedure. Rule 8 (a)(2) requires only a short and plain statement of the claim. A system of open, extra judicial, discovery was adopted to permit the claim, stated initially by only general notice, to coalesce and develop to a point where a detailed and factually complete claim would later be brought before the court for adjudication by a judge or a jury.

Without continued review and adjustment there is a tendency for reforms to return to the *status quo ante*. This Court detected such a tendency in the lower courts and by way of corrective action restated the broad intent of Rule 8(a) in *Swierkiewicz v. Sorema,* 534 U.S. 506 (2002). In an attempt to make its point in a memorable way, the Court gave honorable mention to the abbreviated but effective pleading known to practitioners of the law as the "Boyleston Street Complaint".[2]

In the present case the Petitioner more than stated a basic cause of action. A claim was stated but it was dismissed because it strained the "credulity" of the Judge. Complaint.

2

Note 4 at 534 U.S, 513 states: "These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. R. Civ. P. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: 'On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway'."

App. 12. But "credulity" is not a standard under Rule 8(a). That is a factor in later stages of proceedings but not at the pleading stage.

Perhaps the greatest advocate of the justice of general notice pleading was the late Judge Jerome Frank. In his acclaimed critique "Courts on Trial" he stated:

> "Yet adjudged by their aims, those reformers have failed. For all their admirable efforts they have not succeeded in bringing about what they promised - the easy, simple, unimpeded operation, in court, of the substantive rules in such a way as to prevent litigants from losing suits, which under those rules thy should win."[3]

The problem posed by Judge Frank continues to this day. Examples of the tendency of some federal judges to impose heightened (and unlawful) requirements for Complaints filed in federal courts are many. A few such examples, in addition to the case at bar, of the closing of the federal courthouse door to unfavored cases would include the following, all after *Swierkiewicz*:

> Fourth Circuit. *Dickson, et al v. Microsoft Corporation, et al.*, 309 F. 3d 193 (2002). ("However, I respectfully dissent. Whether or not Gravity would succeed on the merits, it has clearly stated claims under both § 1 and § 2 of the Sherman Act." Gregory, J., dissenting.)

3

FRANK, JEROME, COURTS ON TRIAL (Princeton, NJ, Princeton University Press, 1949) .

Sixth Circuit. *Tahfs v. Proctor, et al.*,316 F. 3d 584 (2003). (Clearly pled allegations of conspiracy with corrupt state officials, dismissal under 12(b)(6) affirmed because " . . . Tahfs makes unverifiable allegations of "corruption' . . ." at 592.)

Eleventh Circuit. *Spanish Broadcasting System of Florida v. Clear Channel Communications, Inc.*, et al., _____F. 3d _____ (June 30, 2004) (Clear allegations of antitrust violation, dismissal on the pleadings affirmed because plaintiff did not allege " . . . specific damage done to consumers in the relevant market.")

CONCLUSION

The policy of *Swierkiewicz* has been declared by this Court but has not taken effect uniformly in the Circuits. It is time for a reaffirmation. This case, involving an unpopular cause, presents an ideal set of facts to do this. For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted:

BRIAN P. MURPHY
Griffin Farmer & Murphy
1912 Sunderland Place NW
Washington, DC 20036
(202) 429-9000
Counsel for Property Rights Foundation of America, Inc.
August 26, 2004